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this suit, so far as it claims possession, must fail, the dower debt being still due.

It has been held on several occasions in this Court that a Muhammadan widow in possession in lieu of her dower cannot sell any portion of the property. She cannot give a good title to any portion of the property, inasmuch as her position is only that of a widow in possession in lieu of her dower. It has never been held, so far as we are aware, that a Muhammadan widow, under such circumstances, can grant a valid mortgage of any portion of the property in her possession in lieu of dower, and the principle of the decisions in which it has been held that she may not sell, appears to us to apply equally to the case of her attempting to mortgage.

We allow this appeal to the extent of giving the plaintiff a decree declaring that the mortgage is inoperative and passes no title to the male defendants.

In other respects we dismiss the appeal. Each party will bear its own costs.

Decree modified.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Burkitt

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July 27.

AMRIT RAM AND ANOTHER (DEFENDANTS) *v.* DASRAT RAM AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, ss. 525, 526—Arbitration—Objection to application to file an award in Court that one party had not agreed to refer any matter to arbitration—Jurisdiction of Court to determine whether the parties had or had not referred the matter in question to arbitration.

AN objection to an application made under s. 525 of the Code of Civil Procedure that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. *Chowdhri Murtaza Hossein* v. *Mussumat Bibi Bechunnissa* (1); *Samal Nathu* v. *Jaishankar Dalsukram* (2); *Venkatesh Khando* v. *Chanapgavda* (3);

* Reference to the Full Bench in First Appeal No. 244 of 1892, decided on the 7th November 1894.

(1) L. R., 3 I. A. 209. (2) I. L. R., 9 Bom., 254.
(3) I. L. R., 17 Bom., 674.

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Lalla Isharee Parshad v. *Harbajan Tewaree* (1); *Hussaini Bibi* v. *Mohsin Khan* (2); *Surjan Raot* v. *Bhikari Raot* (3); and *Muhammed Nawaz Khan* v. *Alam Khan* (4); referred to.

THE facts of this case are as follows:—

One Salig Ram applied under s. 525 of the Code of Civil Procedure to the Court of the Additional Subordinate Judge of Gházipur praying that an award, which he alleged had been made on the 9th of September 1888, between himself and the opposite parties, his father and two brothers, might be filed in Court.

The opposite parties, Amrit Ram the father and Raja Ram the brother of the applicant, both filed written statements, in which they severally denied that any arbitration had taken place to their knowledge, and asserted that the whole property, the subject of the arbitration set up by the applicant, belonged solely to Amrit Ram. Amrit Ram also pleaded that if there had been a reference to arbitration the reference was invalid as not being in writing and registered.

The Additional Subordinate Judge held that it was not necessary that the reference to arbitration should have been registered, and that there had in fact been a reference to arbitration as alleged by the applicant and a valid award made thereon. He also held that no ground such as is mentioned in s. 520 or s. 521 of the Code of Civil Procedure had been shown against the award, and accordingly ordered that the award should be filed in Court.

No judgment, however, was passed and no decree was drawn up by the Court in accordance with this last mentioned order; and subsequently the sons of Salig Ram, who had meanwhile died, applied to the Court that a decree might be drawn up in accordance with the award and in pursuance of the Court's order.

Amrit Ram and Rája Ram resisted this application on various technical grounds, but the Court overruled their objections and passed judgment in the terms of the award, likewise ordering a decree to be prepared in accordance with those terms.

(1) 15 W. R., (F. B.) 9.
(2) I. L. R., 1 All., 156.
(3) I. L. R., 21 Calc., 213.
(4) L. R., 18 I. A. 73.

Amrit Ram and Rája Ram appealed to the High Court urging the following pleas:—

"(1) Because there was no reference and consequently no valid award to form the basis of a decree; (2) because the evidence shows that there was no reference whatsoever; it was also bad for not being in writing and registered; and (3) because the award is also bad under ss. 520 and 521 of the Code of Civil Procedure."

On the appeal coming before a Division Bench it was referred to a Full Bench of the whole Court for consideration of the question raised, as stated in the opening words of the judgment of the Full Bench.

Babu *Viddya Charan Singh*, for the appellants.

Munshi *Gobind Prasad*, for the respondents.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR, BANERJI and BURKITT, JJ.), was delivered by EDGE, C.J.:—

The question which we have had to consider in this reference to the Full Bench is—when an application is made to a Court under s. 525 of Act No. XIV of 1882, that an award be filed in Court, does an objection by the other party, defendant, that he had not agreed to refer any matter to arbitration oust the jurisdiction of the Court to which the application is made to proceed further in the matter, or has that Court jurisdiction to proceed, and should it proceed to try the issue as to whether the parties had referred to arbitration the matter as to which the award purports to have been made?

In support of the contention that such an objection deprives the Court of jurisdiction, *Bijadhur Bhugut* v. *Monohur Bhugut* (1), and the judgments of Prinsep, Pigot and Macpherson, JJ., in *Surjan Raot* v. *Bhikari Raot* (2) were relied upon. In support of a contention raised before us that when such an objection is not obviously frivolous the jurisdiction of the Court to proceed is ousted, *Samal Nathu* v. *Jaishankar Dalsukram* (3) and *Venkatesh Khando* v.

(1) I. L. R., 10 Calc., 11. (2) I. L. R., 21 Calc., 213.
(3) I. L. R., 9 Bom., 254.

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Chanpgavda (1) were relied upon. In further support of those contentions it was argued that we ought to conclude that the Legislature, in order to give effect to the views expressed in the judgment of Lock, Kemp, and Paul, JJ., in *Lalla Ishri Parshad* v. *Har Bhanjan Tewaree* (2) and in the judgment of Spankie, J., in *Hussaini Bibi* v. *Mohsin Khan* (3), which were that a Court had no jurisdiction under section 327 of Act No. VIII of 1859 to file an award where one of the parties denied or did not admit that he had referred any dispute to arbitration or that an award had been made, had introduced s. 526 into Act No. X of 1877, and had re-enacted that section in Act No. XIV of 1882. As to the latter contention, it was much more probable that the Legislature in enacting section 526 of Act No. X of 1877 had acted on the suggestion thrown out by their Lordships of the Privy Council in *Chowdhri Murtaza Hossein* v. *Mussumat Bibi Bechunnissa* (4) at p. 213, and that the intention was to widen the scope of the inquiry upon which a court could enter on an application to file an award when the reference to arbitration had been made without the intervention of a Court of justice. Their Lordships in that case, referring to Act No. VIII of 1859, had said :—"Their Lordships are of opinion that upon the construction of the Act the earlier sections are not incorporated into the s. 327, as they are expressly incorporated into the s. 326, and that the words 'sufficient cause' should be taken to comprehend any substantial objection which appears upon the face of the award or is founded on the misconduct of the arbitrator or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country." It may be noticed that Norman, C. J., and Jackson, J., in *Lalla Isharee Parshad* v. *Har Bhanjan Tewaree* (2), apparently considered that a Court could, under s. 327 of Act No. VIII of 1859, go into the question and decide, but subject to a right of appeal, that the parties had referred the matter in dispute to arbitration and that an award on such matter had been made. As the decision of their Lordships of the Privy Council in *Chowdhri*

(1) I. L. R., 17 Bom., 674.
(2) 15 W. R. (F. B.) 9.
(3) I. L. R., 1 All., 156.
(4) L. R., 3 I. A. 209.

Murtaza Hossein v. *Mussumat Bibi Bechunnissa* (1) was reported in the volume of the Law Reports, Indian Appeals, which was published in 1876, and as ss. 525 and 526 of Act No. X of 1877 apparently give substantial, although possibly not full, effect by legislation to the suggestion of their Lordships at page 213 of the Report, it certainly seems probable that ss. 525 and 526 of Act No. X of 1877 were enacted with the intention of giving effect to the suggestion of their Lordships and not with the intention of affirming by legislative enactment the views of Lock, Kemp and Paul, JJ., as to the scope of s. 327 of Act No. VIII of 1859. However that may have been, we must decide the question before us upon the construction of ss. 525 and 526 of Act No. XIV of 1882.

Before proceeding to consider ss. 525 and 526 of Act No. XIV of 1882 it may be observed that West and Nanabhai Haridas, JJ., in *Samal Nathu* v. *Jaishankar Dalsukram* (2) and Sir Charles Sarjent, C. J., and Candy, J., in *Venkatesh Khanda* v. *Chanapgavda* (3), apparently considered that an objection to an application under s. 525 to file an award that the parties had not agreed to a reference to arbitration did not oust the jurisdiction of the Court in the matter, if the objection was obviously unfounded, which, as it appears to us, involved the proposition that the Court has jurisdiction to consider to a limited extent the evidence for and against such an objection. Even that limited jurisdiction a Court would not have if the opinions on this subject expressed in the judgment of Prinsep, Pigot and Macpherson, JJ., in *Surjan Raot* v. *Bhikari Raot* (4) are correct, according to which the denial or non-admission that the parties had agreed to a reference to arbitration deprives a court of jurisdiction to do otherwise than refuse to file the award.

There can be no doubt that s. 525 of Act No. XIV of 1882 applies only when a matter has been referred to arbitration without the intervention of a Court of justice and an award has been made thereon. There must have been a matter referred to arbitration, there must have been an award on the matter referred, and the reference

(1) L. R., 3 I. A. 209.
(2) I. L. R., 9 Bom., 254.
(3) I. L. R., 17 Bom., 674.
(4) I. L. R., 21 Calc., 213.

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must have been made without the intervention of a Court of justice. These facts must exist as the foundation of the jurisdiction of a Court under ss. 525 and 526 to order the award to be filed. In other cases, when a question as to the jurisdiction of a Court arises, the Court has to hear and determine the question of jurisdiction, and for that purpose, when the question of jurisdiction depends on questions of fact upon which the parties are not agreed, the Court has to take and consider evidence. In our opinion when a Court is in certain events given by statute a jurisdiction, and it is not expressly provided that it shall not exercise that jurisdiction except on the mutual admission of the parties or with their consent, the Court, if its jurisdiction is disputed by a party, must ascertain and determine whether the facts do or do not exist upon which the question of its jurisdiction in the particular matter depends. That we consider to be a matter of general principle. Is that general principle curtailed or made inapplicable by anything contained in s. 525 or s. 526 of Act No. XIV of 1882, or is it by either of those sections recognised?

The application under s. 525 is to be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and the Court shall direct notice to be given to the parties to the arbitration other than the applicant requiring them to show cause within a time specified why the award should not be filed. It has been held, notwithstanding some decisions to the contrary, in *Dandekar* v. *Dandekars* (1), *In the matter of the petition of Dutto Singh* (2), *Jones* v. *Ledgard* (3), *Surjan Raot* v. *Bhikari Raot* (4) and in *Jagan Nath* v. *Mannu Lal* (5), and in our opinion rightly, that the term "to show cause" does not merely mean to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.

By s. 526 it is enacted:—"If no ground such as is mentioned or referred to in s. 520 or s. 521 be shown against the award, the

(1) I. L. R., 6 Bom., 663.
(2) I. L. R., 9 Calc., 575.
(3) I. L. R., 8 All., 340.
(4) I. L. R., 21 Calc., 213.
(5) I. L. R., 16 All., 231.

Court shall order it to be filed and such award shall then take effect as an award made under the provisions of this chapter." It appears to us that if the Legislature had intended by s. 526 to confine the grounds which might be shown to the filing of the award to the precise grounds mentioned or referred to in s. 520 or s. 521, it would have said so, and not used the words "*such as* is mentioned or referred to." It appears to us from the use of the words "such as" that the Legislature intended that the grounds which might be shown should be those mentioned or referred to, or grounds *ejusdem generis* with those mentioned or "referred to, in s. 520 and in s. 521." One of the grounds mentioned in s. 520 is—"(*a*) when the award has left undetermined any of the matters referred to arbitration, or when it determines any matter not referred to arbitration." S. 525 applies as well to a parole or oral agreement referring matters in dispute to arbitration as to an agreement in writing referring matters in dispute to arbitration. For the purpose of illustrating what in our opinion is the construction and an application of s. 526 we take the case of a person coming into Court with three documents. One of them he alleges to be an agreement in writing made between him, A., and another person, B., by which questions *a*., *b*. and *c*. purport to have been referred to arbitration; another of those documents he alleges to be an award made under that agreement of reference which purports to decide the questions *a*, *b* and *c*; the third document being his application to the Court under s. 525. Notice under s. 525 having been given to B. to show cause why the award shall not be filed, he, B., alleges that he did not agree to refer questions *a*, *b* and *c*, or that he did not agree to refer any question to arbitration. It appears to us that that is the same as if B. had said in other words—"the matters determined by the award were not referred to arbitration," or—"the award determines *a*, *b* and *c*, matters not referred to arbitration." That objection, however it was expressed, would not only be *ejusdem generis* with, but would be one of the precise grounds mentioned and referred to in cl. (*a*) of s. 520, and consequently would be a ground which, if taken, a Court would have to consider and adjudicate upon under s. 526, whether the decision of the Court would depend merely upon the construction of the agree-

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ment, or upon evidence on the one side that the agreement in writing was in fact the agreement of the parties, and upon evidence on the other side that the defendant never had entered into the agreement and that it was a forged document, or that the acceptance of the agreement by the defendant had been obtained by a fraud of the plaintiff which would avoid the agreement. In a similar case defendant might say :—"I agreed to refer questions *a* and *b*, but I never agreed to refer question *c*. The plaintiff, after I executed the agreement of reference, fraudulently inserted in it without my knowledge or consent question *c*, and the award has determined question *c*, which was a matter which was never referred to arbitration, and has left undetermined questions *a* and *b*, which were matters referred to arbitration." Those two grounds of objection would in our opinion clearly be within cl. (*a*) of s. 520. Assume again that the alleged award determined only one matter. We can see no distinction, except in phraseology, between a defendant saying, in showing cause to the application to file the award,—"the award sought to be filed determines a matter not referred to arbitration," and his saying, so far as it was pertinent to the issue,—"I never agreed to refer any matter to arbitration." The issue would be the same, namely, "did the parties agree to refer to arbitration the matter determined by this award," and, unless the objection depended solely upon the construction of an admitted agreement of reference in writing, the Court would, under cl. (*a*) of s. 520 as applied by s. 526, have to determine whether any and what agreement of reference was made orally or in writing as the case might be between the parties.

An appeal would lie from the decree which followed the judgment given on the award, even if the decree was in accordance with and not in excess of the award, if the appeal was on the ground that there was no agreement to refer, or on the ground that the award was not the award of the persons to whom the matter was referred. Either of those grounds would question the validity of the award, and, if sustained, would show that the Court which ordered the award to be filed had no jurisdiction under ss. 525 and 526 to

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make the order to file the award. Our answer to this reference is that an objection to an application made under s. 525 that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. How far and under what circumstances a decision upon such an application might operate as *res judicata* may be gathered from the judgment of their Lordships of the Privy Council in *Muhammad Nawaz Khan* v. *Alam Khan* (1).

Before Mr. Justice Blair and Mr. Justice Burkitt.

DURGA DIHAL DAS AND OTHERS (PLAINTIFFS) *v.* ANORAJI AND ANOTHER (DEFENDANTS).*

1894
July 31.

Civil Procedure Code, ss. 562, 564, 566, 622—*Remand—Refusal of Court of first instance to record evidence tendered—Refusal of Appellate Court to record additional evidence.*

THE plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court being satisfied with the documentary evidence produced by the plaintiffs declined to record the evidence of the witnesses tendered by them. The defendants appealed, and the lower appellate Court reversed the decree of the Court of first instance, but in its turn declined to allow the plaintiffs-respondents to produce fresh evidence before it. On appeal by the plaintiffs to the High Court, it was *held* that, though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was warranted *ex debito justitiæ* in setting aside allproceed ings of both Courts below and in directing the Court of first instance to re-try the case, admitting all admissible evidence which had previously been tendered to the Court of first instance and which that Court had refused to record.

THE facts of this case sufficiently appear from the judgment of Blair, J.

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* Second Appeal No. 1068 of 1893 from a decree of Kuar Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 1st September 1893, reversing a decree of Munshi Tara Prasad, Munsif of Bansgaon, dated the 12th April 1893.

(1) L. R., 18 I. A. 73.